IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1977

No. ...77-600

LANSING BOARD OF EDUCATION, a Body Corporate; and Members of the LANSING BOARD OF EDUCATION; viz., VERNON D. EBERSOLE, CLARE D. HARRINGTON, MICHAEL F. WALSH, RAY A. HANNULA, JOAN HESS, J. C. WILLIAMS, BRUCE ANGELL, JOSEPH E. HOBRLA and MAX D. SHUNK,
Petitioners,

vs.

NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, Lansing Branch; CYNTHIA TAYLOR, JUDITH TAYLOR and ANDREA TAYLOR, by Their Father and Next Friend, JAMES R. TAYLOR; MELINDA LEA HEDLEY, CHRISTINE MICHELE HEDLEY, DOUGLAS JOHN HEDLEY and DANIEL JOSEPH HEDLEY, by Their Mother and Next Friend, JOAN L. HEDLEY; PETER MILLER and ELIZABETH MILLER, by Their Father and Next Friend, CHARLES MILLER; FRANK J. PENNONI and JAMES PENNONI, by Their Mother and Next Friend, KATHLEEN PENNONI; and DAVID KRON and LISA KRON, by Their Father and Next Friend, WALTER V. KRON,
Respondents.

PETITION FOR WRIT OF CERTIORARI

To the United States Court of Appeals for the Sixth Circuit

FRED C. NEWMAN
NEWMAN & MACKAY
510 Stoddard Building
Lansing, Michigan 48933
Attorneys for Petitioners

St. Louis Law Printing Co., Inc., 812 Olive Street 63101 314-231-4477

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To the United States Court of Appeals for the Sixth Circuit

Petitioners Lansing Board of Education, a municipal body corporate, and members of the Lansing Board of Education,

namely Vernon D. Ebersole, Clare D. Harrington, Michael F. Walsh, Ray A. Hannula, Joan Hess, J. C. Williams, Bruce Angell, Joseph E. Hobrla and Max D. Shunk, pray that a writ of certiorari be issued to review the judgment and opinion of the United States Court of Appeals for the Sixth Circuit entered in this proceeding on July 26, 1977.

OPINIONS AND ORDERS BELOW

The opinion of the Court of Appeals, 485 F2d 569 (July 26, 1977), appears in the Appendix, pp. 161-184. Other opinions delivered in the Courts below are:

United States District Court for the Western District of Michigan, Southern Division

August 10, 1973, Restraining Implementation of Resolution of Defendant Lansing Board of Education Rescinding Cluster Plan of Busing Children Among Eight Schools and Enlarging Busing Plan to Include Thirteen Elementary Schools, not reported. (1-40)

December 19, 1975, Judgment that Defendant Lansing Board of Education Operated a Dual School System in Lansing School District and Mandatory Injunction Requiring Continued Operation of Busing Plan Affecting Thirteen Elementary Schools in Lansing School District, not reported. (A. 44-140)

JURISDICTION

The judgment of the Court of Appeals for the Sixth Circuit was entered on July 26, 1977. This petition for certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 USC 1254.

QUESTIONS PRESENTED

I

Did the Defendant Board Have an Affirmative Duty to Act to Preclude Elementary Schools From Becoming Segregated and to Integrate Racially Identifiable Schools?

II

Did the Court of Appeals Err in Affirming the District Court's Employment of "the Natural and Foreseeable Consequences" Test to Establish Both That an Action of the Defendant Board Was Discriminatory and That It Was Racially Motivated?

III

Did the Court of Appeals Err When It Found the Defendant Board Was Guilty of Certain Discriminatory Actions and Omissions But Failed to Determine Whether the Discriminatory Actions and Omissions Resulted in the Condition of Segregation at Any Elementary School in Lansing School District at the Time of Trial?

IV

Did the Court of Appeals Err in Affirming the Remedy Imposed on the Defendant Board Where the District Judge Had Not Made the Required Incremental Effects Test?

V

Is the Relationship Between the Segregative Acts Attributed to the Defendant by the Court of Appeals and Present Segregation "So Attenuated as to Be Incapable of Supporting a Finding of De Jure Segregation Warranting Judicial Intervention"?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution:

Amendments. Article XIV, Section 1—"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

Introduction

The Lansing School District was first organized in 1847. For many years the boundaries of the City of Lansing, capital of the State of Michigan, and Lansing School District were coterminous or nearly so. The area now embraced within the School District is approximately 50 square miles, a substantially larger area than that of the City. The greatest expansion in the history of Lansing School District occurred between 1958-1965 when all or portions of twelve neighboring school districts annexed to the Lansing School District.

The Grand River meanders through Lansing, Michigan, forming a large U as it flows from west to east, south to north, and east to west. The eastern portion of the large U bears the geographic misnomer of "River Island Area." Within the River Island Area there are eight elementary school service areas.

They are: Main Street, Lincoln, Kalamazoo Street, Michigan, Verlinden, Willow, Genesee and Walnut. At the present time there are elementary school buildings in each service area except Lincoln and Kalamazoo Street. In addition, the new Vivian Riddle School which was opened in September, 1976, lies within the River Island Area and would serve elementary students who reside in Lincoln, Kalamazoo and Michigan Avenue service areas if it were operated as a neighborhood school.

In 1950, the population of Lansing, Michigan, was overwhelmingly white. There were 2979 black people out of a total population of 92,129. In 1960, there were 6745 blacks out of 107,807. (61-62)

The black population of Lansing in 1950 was concentrated in the southerly part of the River Island Area. 8.2 percent of the people there were black and 91.8 percent of the people were white. (402)

In 1960, the black population in the River Island Area was 20.1 percent of the population there and 79.9 percent was white. (402) In 1970, blacks constituted 33.2 percent of the population and whites constituted 66.8 percent of the River Island Area population. (402)

As black people moved into previously white neighborhoods in the River Island Area ". . . the racial composition of elementary schools changed accordingly." (62)

In 1950 Lincoln School was 99% black.

In 1956 Main Street School was 62% black.

By 1964 Kalamazoo Street School was 81% black and Michigan Avenue School was 74% black.

The Lansing Board of Education followed a system of establishing a neighborhood concept of attendance areas. (302) School children were never separated on the basis of race in

the schools in Lansing School District. The positive law of Michigan has prohibited dual school systems since at least 1869.

Plaintiffs commenced this class action by filing a Complaint on October 17, 1972, in the United States District Court for the Western District of Michigan, Southern Division. Plaintiffs sought to enjoin the holding of a recall election of certain members of the Lansing Board of Education and to restrain the Lansing Board of Education from rescinding a certain elementary school pupil desegregation plan designed to achieve a better racial balance in certain elementary schools in Lansing School District.

On October 20, 1972, plaintiffs amended their Complaint for the sole purpose of making changes as to the parties defendant.

Plaintiff's motion for preliminary injunction to restrain the holding of the recall election was not granted.

On February 27, 1973, plaintiffs filed a "Supplemental Complaint for Declaratory and Injunctive Relief" to allege that the recall election had taken place, to drop Board members who had been recalled and to add as party defendants the new Board members. Plaintiffs averred that the Lansing Board had on February 1, 1973, rescinded portions of its "Equal Educational Opportunity Policy Resolution," rescinded the elementary school desegregation plan which had been adopted on June 29, 1972, claimed that the purpose and effect of the rescinding resolution was the resegregating of the Lansing school system and the denial of plaintiffs of the "equal protection of the laws of the United States and equal educational opportunities guaranteed by the 13th and 14th Amendments to the Constitution of the United States." Plaintiffs prayed for both a temporary and permanent injunction to preclude defendants

from giving effect to the rescinding resolution and to reinstate the elementary school plan of June 29, 1972.

This lawsuit involves 6 of the 48 elementary schools in Lansing School District relative to the charge of illegal segregation. Seven other schools are involved because they are in the Cluster Plan.

Hearing on plaintiffs' motion for preliminary injunction took place July 17 and 18, 1973.

On August 10, 1973, the District Judge entered an injunctive order that restrained defendants from giving any effect to the resolutions adopted by the defendant Board on February 1, 1973, which revised the policy statement on equal educational opportunity and rescinded the so-called desegregation plan of June 29, 1972. In addition, the District Judge ordered that:

> "The June 29, 1972, Lansing Board of Education plan be reinstated and that its provisions be implemented at the appropriate times." (39-40)

Defendants' motion for stay was denied on August 10, 1973. Defendants' application for stay in the United States Court of Appeals for the Sixth Circuit was denied on August 29, 1973.

Trial on the merits of the litigation commenced October 15, 1975. The case was submitted on November 20, 1975. On December 19, 1975, the District Judge filed his opinion and judgment. Judge Fox "ordered, adjudged and decreed" that the resolution adopted by the defendant Lansing Board of Education February 1, 1973, which revised "the policy statement on equal educational opportunity" and rescinded "the desegregation plan of June 29, 1972," was "unconstitutional, void and of no effect." The defendants were enjoined and restrained from enforcing the resolutions adopted February 1, 1973, and

the remedy ordered August 10, 1973, involving the busing of school children in 13 elementary schools in Lansing School District was continued until the further order of the Court. (159-160)

On January 14, 1976, defendants filed notice of appeal.

On July 26, 1977, the United States Court of Appeals for the Sixth Circuit affirmed.

At the trial the District Judge considered certain actions and omissions of the defendant Board and found constitutional violations on the basis of the "foreseeable effects test."

(1) **Attendance Zone Boundaries.**

Only two boundry matters, both of which occurred in 1957, were considered.

Prior to March 28, 1957, the defendant Board rejected the request of white people in Main Street School service area to detach this area and reattach it to Verlinden which was a white school. On March 28, 1957, the defendant Board resolved it could not change boundary lines as requested by blacks to reduce "the Negro to white ratio" at Main ". . . unless some children travel unreasonably long distances, in some cases completely across a school district and into the district of a distant school." (328-330)

In the same resolution the defendant Board rejected the request of whites to permit parents to transfer any child in Main Street School to another Lansing school because this "would result in Main Street School soon having an all Negro enrollment." And the Board also rejected the request of white people for the construction of an elementary school in the Heatherwood Area which was a white area in the Main Street School attendance zone.

The second boundry line matter related to a resolution adopted July 8, 1957. The boundary line change was made to relieve overcrowding at Kalamazoo. An area where 12 white students resided was detached from Michigan and added to Verlinden. An area where 58 elementary school children lived was detached from Kalamazoo and added to Michigan. (342-343)

The area detached from Kalamazoo and reattached to Michigan was in Census Tract 15 which was even in 1960 still 59% white. The bulk of Michigan attendance area was in Census Tract 15. (400; 401) Kalamazoo Street School was in 1950 90% white and 10% black. (214-215)

On the basis of the foregoing facts the District Judge said:

> "Attendance zone alterations which have the effect of exacerbating racial imbalance and isolation have been found in numerous cases to be indicia of segregative intent." (66-67)

The Court of Appeals concurred. (172)

Neither Court made any finding as to the effect of the defendant Board's refusal to change boundary lines at Main and its changing boundary lines at Verlinden, Michigan and Kalamazoo on the condition of segregation at Michigan at the time of trial. Kalamazoo had been closed in 1970 and Verlinden was naturally integrated.

(2) **Transfers.**

The District Judge considered the matter of transfers requested on the basis of emotional problems and supported by a physician's certificate.

There was testimony as to a belief that these transfers were abused. There was no evidence that any medical certificate

supporting a transfer requested on the basis of emotional problems was not valid. (188-189)

It is noted that the resolution of March 28, 1957, provided for the construction of "a special room for emotionally disturbed children." (330)

The District Judge found that medical transfers enabled whites to escape from black Main and Michigan to "White Verlinden."

There is no evidence that any child was transferred because of emotional need after 1970. In 1970 and 1971 there were only 4 white non-resident pupils at Verlinden and 3 in 1972. There is no evidence of any non-resident pupils at Verlinden after 1972.

The District Court made no determination as to the effect on the condition of segregation at Michigan, Main and Verlinden at the time of trial.

(3) **Mobile Units at Main Street School.**

Two mobile units were used at Main Street School to relieve overcrowding for four school years ending in 1965. Mobile units were used at white schools at the same time and even to the time of trial to relieve overcrowding.

(4) **Physical Conditions and Facilities.**

The District Judge found that Michigan Avenue School was an inferior facility.

Michigan Avenue did deteriorate because the Board intended to close it as an elementary school. Michigan Avenue School had a deficient heating system as did 12 white elementary schools.

The 1965 Citizens' Advisory Committee which included blacks some of whom were members of the NAACP recommended that Michigan Avenue School "building be phased out as a K-6 [elementary] facility with no major expenditures made on the physical plant."

The defendant Board's resolution that implemented this recommendation was introduced by Mrs. Hortense Canady, a prominent NAACP member who also served on the defendant Board. (230)

Michigan Avenue School was renovated in 1972 after the Board, because of conditions beyond its control, was unable to close it as an elementary school. The State of Michigan finally purchased the building.

(5) **Faculty Hiring and Assignments.**

The District Judge found that at the time of trial there was no discrimination in the hiring practices of the District. However, he found that the disproportionate assignment of minority teachers to minority schools "has had the effect of increasing and perpetuating the racial identifiability of the schools in question, and that this effect was a natural and foreseeable consequence of the policy."

Ony 3 schools were cited. And one of them, Lincoln, was closed in 1965.

33% of the teachers at Main were black and 80% of the students were black.

46% of the teachers at Michigan were black and 81% of the students were black. The staff at Michigan was a "super staff." The present Director of Elementary Education in the School District, a black woman, was once a teacher at Michigan. (202)

The principals select the teachers for their building. There was no assignment of teachers on the basis of race. The best

qualified person for the job was hired. (201; 205; 208; 211; 322-323) The evidence demonstrated that defendants' counsel erroneously stipulated that the Board followed a policy of assigning minority teachers to minority schools. The only policy was to allow the principals to select the teachers.

(6) **The Cluster Plan.**

A Citizens' Advisory Committee in April, 1972, recommended to the defendant Board the adoption of a plan to desegregate some of Lansing's elementary schools and suggested several plans. The Committee noted that citizens communicated to it saying "we believe in integration, but we don't want busing." (373)

Recall petitions were circulated against Board members who favored busing to desegregate the elementary schools. (192)

A suit was filed on June 15, 1972, in the Ingham County Circuit Court to enjoin the defendant Board from adopting a desegregation plan; the Ingham County Circuit Court issued a temporary restraining order which prevented the Board from voting on a desegregation plan. Judge Fox granted the defendant Board's petition to remove the suit from the Michigan Court to Federal Court. On June 26, 1972, Judge Fox set the temporary restraining order aside and on June 29, 1972, the defendant Board adopted the Cluster Plan which involved 8 schools initially and 13 schools starting in September, 1973. The plan involved grades 3 through 6. The Cluster Plan required busing of children from out of the neighborhood schools to other schools. (95-97) The plan sought to establish a racial balance in each school, so that there would be not less than 10% minority nor more than 45% minority in each school. (197) Black students and white students were principally involved in the first year's operation of the Cluster Plan.

The second year brought Spanish surnamed children into the program.

Sufficient petitions for a recall election were filed before the Cluster Plan was implemented in September, 1972, but an election could not be scheduled until November, 1972. (101)

The five Board members who voted for the Cluster Plan resolution were recalled.

Five new members were elected to replace the recalled members.

A majority of the newly constituted Board voted on February 1, 1973, to rescind the Cluster Plan resolution and reinstate the neighborhood school policy.

In 1973, the defendant Board undertook a survey that showed that 41% of the black people opposed busing their children away from their neighborhood school.

In 1975 the Board reviewed the educational results of the Cluster Plan resolution. The review disclosed that busing of children accomplished nothing academically based on reading and math test scores. Another survey revealed that attitudinally busing accomplished nothing.

The District Judge on August 10, 1973, nullified the vote of the defendant Board to rescind the Cluster Plan and ordered continuance of the Cluster Plan. (39-40)

(7) **One-Way Busing.**

One-way busing of black students from a neighborhood school was first suggested by the NAACP and the Main Street P-TA. One-way busing was an alternate method to the use of mobile units to relieve overcrowding. One-way busing commenced in 1964. (175; 222)

Lincoln and Kalamazoo Street Schools were closed and the students from their attendance zones were bused to other elementary schools. The 1965 Citizens' Committee on Educational Opportunity approved the closing of Lincoln and recommended the closing of Kalamazoo. This Committee had a

number of black members including several prominent members of the NAACP. (224-228)

Mrs. Hortense Canady, a member of the defendant Board and a prominent member of the NAACP, introduced the resolution to close Kalamazoo. (229-230; 308)

The black community favored the closing of Lincoln and Kalamazoo Street schools. (190-192; 307)

(8) **Site Selection.**

The District Judge found that selection of the site for construction of Vivian Riddle School 'proves segregative intent beyond question." (182)

Selection of the site for Vivian Riddle School was made in conjunction with a City-sponsored program known as "Kingsley Place Development," which was funded by the Federal Government. "Kingsley Place Development" involves the erection of a community building and the development of a park. Black citizens participated in the initiation and development of this project and they desired to have a school in the same area. (296-298)

A 1973 survey of the people whose childlren would be able to attend Vivian Riddle School if it were operated as a neighborhood school showed that 49% of the black people and 67% of the white people wanted it operated as a neighborhood school. 16% of the black people wanted it operated as a school open to everyone and 29% of the black people wanted it operated as a neighborhood school. (260; 274)

BASIS FOR DISTRICT COURT JURISDICTION

Jurisdiction of the District Court was invoked under 28 USCA 1331(a); 1343(3) and (4); under 42 USCA 1983, 1988 and 2000(d); and under 28 USCA Sections 2201 and 2202.

REASONS WRIT SHOULD BE GRANTED

I

The Court of Appeals for the Sixth Circuit Erred in Holding That the Defendant Board Had an Affirmative Duty to Act to Preclude Elementary Schools From Becoming Segregated and to Integrate Racially Identifiable Schools.

The District Judge repeatedly faulted the defendant Board because it did not act to prevent a school from becoming segregated and because it did not integrate racially identifiable schools. The District Judge erred in so holding and the Court of Appeals erred in affirming.

This Court held in *Swann v. Board of Education*, 402 US 1 at Pg. 28 (1967):

> "Absent a constitutional violation there would be no basis for judicially ordering the assignment of students on a racial basis."

The Court of Appeals for the Sixth Circuit held in the case of *Deal v. Cincinnati Board of Education*, 369 F2d 55 (1966):

> "We hold that there is no constitutional duty on the part of the Board to bus Negro or white children out of their neighborhoods or to transfer classes for the sole purpose of alleviating racial imbalance that it did not cause, nor is there a like duty to select new school sites solely to further such a purpose."

The District Judge and the Court of Appeals ignored these decisions.

Chronologically the first unconstitutional segregative act finally attributed to the defendant Board by the District Judge is based upon the fact that the Board did not make a bound-

ary change in 1957. (63) In 1957 white parents requested that part of the attendance area of Main Street School be detached and reattached to Verlinden Street School. (64) Black parents requested that the Board "change boundaries to reduce concentration of Black students at Main." Neither request was granted. The defendant Board was under no constitutional duty to grant either request. The Board was not responsible for the fact that the number of black students was increasing at Main Street School. The trial judge recognized the truth of this proposition when he said, "Blacks continued to move into the Main Street School service area, and the number of Blacks in the school continued to increase." (62)

The District Judge stated as to the matter of integration and annexations:

> ". . . between 1949 and 1965 there were 18 separate annexations of neighboring school districts by the Lansing School District. Def. Ex. 79A, B. . . . Each of these annexations presented the Board with an affirmative opportunity to re-examine the attendance zone boundaries of the district, and to work toward racial integration. Instead, in each instance, the Board chose neither to reorganize service areas nor to initiate any other action which would have minimized discriminatory racial isolation." (67-68)

The District Judge made no finding of "discriminatory racial isolation" that occurred prior to 1957. Without regard to whether the trial judge ever determined that the defendant Board was responsible for "discriminatory racial isolation" subsequent to 1957, he made no such determination as to anything that took place before 1957. Obviously it is the view of the District Judge that a board of education is legally obligated "to work toward racial intergration" even in the absence of constitutional violations that produced segregated schools.

The Court of Appeals also shares the same point of view for it declared: (171)

> "Boundary changes between Main, Michigan and Verlinden could have decreased the racial identifiability of these schools." (171)

The Court of Appeals did not find any constitutional violation that compelled such changes.

The District Judge also stated that when the number of students attending Kalamazoo and Lincoln Schools decreased, the resulting classroom vacancies presented the Board with an opportunity to bring white students in and integrate those schools. (81) The District Judge did not find any constitutional violation by the defendant Board that required the Board to integrate Lincoln and Kalamazoo.

The District Judge and the Court of Appeals simply disregard *Swann* and *Deal*, supra. As a result they erred in holding that the defendant Board was under a duty to make a boundary change at Main in 1957 and that its failure to make such a boundary change was unlawful.

II

The Court of Appeals Erred in Affirming the District Court's Employment of the "Natural and Foreseeable Consequences" Test to Establish Both That an Action of the Defendant Board Was Discriminatory and That It Was Racially Motivated.

The District Judge reviewed certain actions of the defendant Board, such as boundary line changes, use of mobile units, implementation of a medical transfer policy, assignment of teachers to schools, one-way busing, rescission of the Cluster Plan and construction of Vivian Riddle School. He then applied the "natural and foreseeable consequences" test to find that these actions were discriminatory because they exacerbated or aggravated a condition of segregation at Main, Michi-

gan Avenue and Verlinden Schools. He then inferred that because the action exacerbated or aggravated a segregative condition at a school that the action was racially motivated.

The Court of Appeals affirmed the District Judge's employment of the "natural and foreseeable consequences" test to establish both discriminatory result and racially motivated purpose.

The Court of Appeals asserted in its opinion that "Judge Fox explicitly adopted a test dependent on purposeful segregation by public school officials." (165) However, the opinion of the Court of Appeals does not reveal any test employed by Judge Fox other than the "natural and foreseeable consequences" test. Judge Fox stated:

> "In order to fairly assess the alleged actions and inactions of the defendants, and to determine what the foreseeable consequences of these acts and omissions were, it is necessary to consider the conditions existing when they occurred." (58)

It is readily apparent that an action might have a discriminatory effect but not be racially motivated. In the case at bar, children were transported from the attendance zone of their neighborhood school to a distanct school. This action was incontrovertibly discriminatory. These children were not allowed to attend their neighborhood school. However, the action was not racially motivated. The Court of Appeals stated:

> "In 1964, parental pressure forced the Board to transport students to Walnut School to relieve overcrowding at Main." (175)

In yielding to parental pressure the Board obviously was not racially motivated. But it was certainly discriminatory. Nonetheless, the Court of Appeals said:

> "We therefore affirm the District Court's finding that the one-way busing of black children, beginning in 1965 and continuing to the present without a corresponding effort to spread the burden of integration more equitably through the system, is an act of *de jure* segregation." (177)

(Actually one-way busing began in 1964).

It is also evident that an action of a Board of Education might be racially motivated but not have a discriminatory effect. An example might be a refusal of a Board of Education to establish a drivers education program at a racially segregated school, because the Board members were of the opinion that black students were not qualified to have such a program simply because they were black students. The action of the Board in refusing to have a drivers education program would be clearly racially motivated on the hypothetical set of facts. However, it would not be discriminatory if there were no drivers education program at any of the schools in the school system.

Logically there is no basis for holding that the foreseeable consequences test can be a basis for finding both discriminatory action and racially motivated purpose. It would seem that this Court has rejected the efforts of some Circuits "to read the 'natural and foreseeable consequences' test into the *Keyes* requirement of segregative intent." (Footnote 6 on p. 389 of the *U.S. v. Texas Education Agency*, 532 F2d 380 (1976)). Judge Wisdom wrote in *U.S. v. Texas Education Agency:*

> "As articulated in Austin I, the case before us presents not only the use of a neighborhood assignment policy in a residentially segregated school district, but also the taking of actions dating back to the early 20th Century that the natural, foreseeable and avoidable result of creating and maintaining an ethnically segregated school system.

This Court remanded *U.S. v. Texas Education Agency* for reconsideration in light of *Washington, Mayor of Washington, D.C., et al. v. Davis, et al.*, 426 US 229 (1976).

In *Washington, Mayor of Washington, D.C., et al. v. Davis, et al., supra,* this Court said:

> "The school desegregation cases have also adhered to the basic equal protection principle that the invidious quality of the law claimed to be racially discriminatory must ultimately be traced to a facially discriminatory purpose."

In *Dayton Board of Education, et al. Petitioner v. Mark Brinkman, et al.,* 97 S Crt Rep 2766 (1977) this Court held:

> "The duty of both the District Court and of the Court of Appeals, in a case such as this, where mandatory segregation by law of the races in the schools has long since ceased, is to first determine whether there was any action in the conduct of the business of the school board which was intended to, and did in fact, discriminate against minority pupils, teachers or staff."

This Court has surely rejected the "natural and foreseeable consequences" test to establish "racially discriminatory purpose."

In the case at bar the District Court and the Court of Appeals employed the "natural and foreseeable consequences" test to establish both discriminatory effect and racially motivated purpose. Neither the District Court nor the Court of Appeals applied the test set forth in *Washington v. Davis* at page 242 that "an invidiously discriminatory purpose may often be inferred from the totality of relevant facts."

Review of the findings of the District Court and the Court of Appeals as to actions of the defendant Board demonstrate that the District Court and the Court of Appeals repeatedly employed only the "natural and foreseeable consequences" test and did not draw inferences "from the totality of relevant facts."

Boundary Lines:

The Court of Appeals said:

> "The District Court found that in the late 1950's the Board of Education deliberately froze attendance zone boundaries to contain black students within predominately black schools, while altering the attendance zone boundaries between the white Verlinden service area and the black Michigan and Kalamazoo service areas in a manner which 'had the foreseeable effect of increasing the racial identifiability of Michigan Avenue School.'" (171)

The District Judge stated:

> "Attendance zone alterations which have the effect of exacerbating racial imbalance and isolation have been found in numerous cases to be indicia of segregative intent." (66-67)

The record actually discloses that the Trial Court and the Court of Appeals, in fact, considered only two boundary matters. The sweeping conclusionary generalizations are not supported by the record and the Court erred in applying the foreseeable effects test.

A. Boundary line at Main.

On March 28, 1957, the defendant Board adopted a resolution that among other things set forth that the defendant Board could not adopt a recommendation that it "adjust further the school boundaries to reduce the Negro to White ratio" because no "material results" could be accomplished "unless some children travelled unreasonably long distances, in some cases completely across a school district and into the district of a distant school." (329) The defendant Board recognized that Main Street School at that time was a predominantly black school and could develop into a completely segregated school, a "situation not conducive to satisfactory race relations." However, as the District Court said:

"Blacks continued to move into the Main Street School service area, and the number of blacks in the school continued to increase." (62)

The defendant Board has shown hereinbefore that under decisions of this Court and the Court of Appeals, the defendant Board was not under any constitutional obligation to change boundary lines to relieve racial imbalance.

The District Judge, nonetheless, some eighteen (18) years later challenged the statement that boundary lines could not be changed without causing some children to travel unreasonably long distances. The District Judge did not specify a boundary line that could have been adopted by the Board of Education in 1957 that would have changed the black-white ratio at Main. Stating that at least ⅓ of the attendance zone of Verlinden School was within a mile of Main Street School, he implied that if the Main Street boundary line had been extended north into what was then the Verlinden attendance zone, white children would then have been required to attend Main Street. Aside from the fact that there was no evidence to show that extending the boundary line north into the Verlinden zone would have resulted in enough white children being brought into Main Street School to affect the black-white ratio to an appreciable degree, there is the obvious question of denial of equal protection of the law to the white children. The theoretical boundary line change implicit in the Trial Judge's finding would be made on a racial basis, that is, to cause white children to change from the neighborhood school they attended to a distant school for the purpose of achieving a better racial balance at the distant school. In addition, bringing white children into Main Street School by changing the boundary line in such a fashion would add to the problem of overcrowding that already existed at Main Street. Then to relieve overcrowding at Main Street, black children would have to leave their neighborhood school and cross their neighborhood school attendance zone, cross a part

of the Michigan Avenue attendance zone and go into Verlinden zone. The children who would have had to walk unreasonably long distances were black children. In 1957, the black children lived south of Main Street. The white children who attended Main Street School lived north of Main Street. (239)

The District Judge by implication condemns the action of the defendant Board and seemingly finds it in violation of the Constitution. The District Judge applied no other test than the foreseeable effects test. He did not apply the "totality of relevant facts" test. The resolution of the defendant Board, plus it prior actions, absolutely refute any racially motivated purpose in its adopting the resolution.

The District Judge noted that in 1956 the Board attempted to change the ratio of blacks and whites by establishing within the attendance area of Main an optional zone from which students living there could go to Lincoln or Kalamazoo. The District Judge also noted that the Board had denied the request of whites to detach the area where they resided from Main Street School and attach it to Verlinden. (64) The District Judge while noting that the resolution of the Board rejected the request that a new elementary school be constructed, did not note that this request was made by white parents. The fifth recommendation was that the Board "immediately construct an elementary school in the Heatherwood Area." The Heatherwood Area was a white area at that time. (239).

The District Judge did not mention that the Board also rejected another request that was made by whites. The white parents requested that parents be permitted "to transfer any child in Main Street School to another Lansing school." The defendant Board rejected this request because granting it "would result in Main Street School soon having an all Negro enrollment."

The action of the defendant Board in rejecting a request made by black parents for boundary line change was not racially motivated. The defendant Board rejected the request of whites that the area in which they lived be detached from Main and attached to Verlinden. The defendant Board rejected the request of whites that parents be permitted to transfer their children from Main Street School to another Lansing school and the Board rejected the request of whites that a new elementary school be constructed in the white area. The District Judge also ignored the fact that it would be black children who would be required to walk unreasonably long distances. While it was foreseeable that the number of black students would increase at Main the conclusion of the Board that it could not prevent this development by a boundary change was not racially motivated.

B. **Boundary lines at Michigan, Verlinden and Kalamazoo.**

The District Judge considered a boundary line change that involved Michigan, Verlinden and Kalamazoo Schools. The District Judge said the Board altered the boundary lines in September, 1957. Actually, the resolution was adopted July 8, 1957. (331) At the trial it was stipulated that if Lansing School District's Information Services Director John Marrs had been sowrn to testify he would have testified that this boundary line resolution was adopted to relieve overcrowding at Kalamazoo Street School. (65) The District Judge discounts this reason, ignoring the undisputed and undisputable facts in the record, and by employment of the foreseeable consequences test came to the conclusion that the action of the Board had the "effect of exacerbating racial imbalance and isolation" and was evidence of "indicia of segregative intent." (66-67) The Court of Appeals went even further than Judge Fox did. On Page 11 of its opinion, the Court of Appeals said "the boundary changes took an all white area from Michigan,

which was becoming increasingly black, and transferred it to Verlinden, which was white, and at the same time a black area was transferred from the Kalamazoo service area to Michigan." (171)

The District Judge and the Court of Appeals both ignored the fact that the boundary line changes in question did relieve overcrowding at Kalamazoo. The following facts demonstrate that detaching the area from Kalamazoo and attaching it to Michigan Avenue relieved overcrowding at Kalamazoo. The capacity at Kalamazoo was 568 students.

School	Enrollment in 1956-57	Enrollment in 1957-58	Increase
Verlinden	307	319	12 (343)
Michigan	238	296	58 (342)
Kalamazoo	551	557	6 (342)

The boundary line change resulted in an increase of 58 students at Michigan Avenue. If these 58 students had not been taken from Kalamazoo, Kalamazoo Street School would have had an enrollment in excess of its capacity.

The area that was detached from Kalamazoo, contrary to the finding of the District Court and the Court of Appeals, was in fact a white area and Kalamazoo Street School was, in fact, a white school in 1957. The two court rule should not preclude petitioners from showing that the findings of the District Court and the Court of Appeals are contrary to the official U.S. Census records and, in fact, are not supported by the testimony of any witness. The area in question is described as:

> "The Michigan Avenue School area shall include the area from Logan Street West to Jenison Avenue between Kalamazoo Street and Washtenaw Street. A corresponding

change shall be made in the Kalamazoo Street School area." (331)

The described area is located in Census Tract 15. (400) Even in 1960, U.S. Census Tract 15 was 59% white. (402) No one testified that this area was black in 1957. And the U.S. Census records show that even in 1960 Census Tract 15 was 59% white.

A witness who attended Kalamazoo Street School in 1957, testified the student population was 90% white and 10% black at that time. (214-215)

The findings of the District Court and the Court of Appeals relative to boundary matters are completely erroneous because the inference of racial motivation resting solely upon the foreseeable effects test is contrary to the undisputed evidence that shows racial motivation played no part in the decision of the defendant Board.

C. **Transfers.**

The District Judge stated:

"The Board's intentional maintenance of the [medical] transfer policy, and its refusal to change it, had the clearly foreseeable effect of increasing racial identifiability of Main Street School, Michigan Avenue School and Verlinden Street School." (76)

The Court of Appeals stated:

"The Court concluded that the 'Board's intentional maintenance of the transfer policy and its refusal to change it, had the clearly foreseeable effect of increasing racial identifiability of Main Street School, Michigan Avenue School and Verlinden Street School.' We affirm the inference

of segregative intent drawn by the district court from continuation of the special transfer policy." (174)

The medical transfer policy referred to permitted the transfer of a student from the school servicing the attendance zone in which the child lived to another school on the basis of emotional need supported by a certificate of a physician. Both black children and white children were transferred on the basis of emotional need. (186)

There is no evidence that the Board of Education was racially motivated in adopting the policy. There is no evidence that the Board of Education was racially motivated in the implementation of the policy.

There is no evidence that the Board of Education was racially motivated in continuing the policy, although Citizens Committees did indicate that if the policy were abused it would contribute to the segregative condition of schools. A school administrator did testify that in his opinion the medical transfer policy was being abused. However, neither the Court of Appeals nor the District Court considered the totality of relevant facts, in drawing an inference from foreseeable effects of increasing racial identifiability of Main, Verlinden and Michigan.

In 1957 the Board of Education provided for "a special room for emotionally disturbed children" at Main Street School. (330) And of the utmost significance, but completely ignored by the District Court and the Court of Appeals, is the fact that the Chairman of the Sub-Committee of the 1961 Citizens Committee, who objected to the medical transfer policy because it did not require a psychiatrist's certificate, acknowledged that the Sub-Committee had no evidence that a medical certificate issued in connection with the application for a child to transfer for emotional reasons was not valid. (188) There was, in fact, no evidence that any medical certificate that was issued

by a physican in connection with the application for a transfer based on emotional need was not valid.

It should also be emphasized that there is no evidence that any transfer has been made to Verlinden since 1970 on the basis of a medical certificate.

D. **Mobile units.**

The Court of Appeals stated: (175)

> "Given other practices suggesting purposeful separation of the races in Lansing elementary schools, the district court was warranted in inferring segregative intent from the Board's use of mobile classrooms at Main and Verlinden."

The "other practices suggesting purposeful separation of the races" were at that time only the matter of boundary questions and the medical transfer policy. Neither of these practices was racially motivated. The District Court and the Court of Appeals relied on the foreseeable consequences test to draw an inference of racial motivation when a consideration of the totality of relevant facts demonstrated that the Court of Appeals was not justified in using the foreseeable effects test and that the relevant facts showed that there was no racial motivation. Facts disregarded by the District Judge and the Court of Appeals with regard to the use of mobile units at Main Street School were that two mobile units were used for a period of four years (1962-1965) at Main Street School, while mobile units were used at white schools for a much longer period of time. (393)

Mobile units, when they were employed, were used solely to relieve overcrowding. The mobile units were used temporarily until overcrowding was eased. The Board of Education anticipated that overcrowding would be reduced at Main Street in a matter of a few years, because of the fact that projects were contemplated which would result in a decrease of population in the Main Street attendance zone. The population decrease did take place and overcrowding at Main Street was eliminated.

The NAACP recognized that mobile units were used to relieve overcrowding and no claim was made at the time mobile units were being used that the Board of Education was motivated by a racially discriminatory purpose in using them at Main Street School.

E. **Assignment of teachers.**

The District Court stated that the disproportionate assignment of minority teachers to minority schools "has had the effect of increasing and perpetuating the racial identifiability of the schools in question, and that this effect was a natural and foreseeable consequence of the policy." The Court of Appeals affirmed. (175)

It is difficult to believe that at a school where the student population is 100% black the fact that the principal and three teachers out of a teaching staff of eight are black increases the racial identifiability of the school. The school in question, namely, Lincoln School, was closed in 1965.

It is also difficult to imagine that a teaching staff that is ⅓ black at a school where 80% of the students are black increases the racial identifiability of that school. The same observation may be made as to Michigan Avenue School, where 46% of the teaching staff at one time were minority and the student population of the school was over 80% black.

The District Court stated that the Board did not make any explanation for the fact that there was a disproportionate assignment of minority teachers to the three schools in question.

(87) The Board, in fact, proved that principals at the schools determined in most cases who the teachers would be in their building. (200; 201; 205; 211) The Board also established that the best teachers were hired for the available jobs. The principals selected the best teachers that were available, and the principals had in mind the needs and desires of the community served by the school. Elementary principal Dennis Semrau denied that teachers were assigned on a racial basis. (322; 323) There is no evidence that the so-called disproportionate assignment of minority teachers to minority schools was racially motivated. The foreseeable consequences test does not warrant the inference of discriminatory effect nor racial motivation. The facts establish that there was no racial motivation.

F. **One-way busing.**

The District Judge asserted that ". . . the natural and foreseeable effects of their acts [one-way busing] were clearly discriminatory." (119)

However, he also stated that ". . . [the defendant Board members] decisions instituting one-way busing cannot be said to have been motivated by a pernicious or invidious intent." While this statement would appear to eliminate any claim of constitutional violation, the District Judge went on to say that:

> "When the new board voted in 1973 to rescind the Cluster Plan, it left intact the practice of one-way busing. While the actions of the old Board can be seen on a continuum as moving toward spreading the burden of desegregation equally between Black and White students, the vote of the new Board clearly manifests a willful intent to place it solely on Black children. The Court finds that the Board knew of and intended this effect."

Some of the children who were being bused were from Lincoln and Kalamazoo attendance areas. Since Lincoln and Kalamazoo

schools had been closed these students would have had to be bused until a new school was built. The new Board desired to eliminate one-way busing by operating neighborhood schools. Vivian Riddle School operated as a neighborhood school would eliminate one-way busing. (The Court of Appeals stated that distance would require busing of students to Vivian Riddle School if it were operated as a neighborhood school. (183) The basis for this statement has not been discovered. It is erroneous in any event).

III

The Court of Appeals Found the Defendant Board Guilty of Certain Discriminatory Actions and Omissions But Erred When It Failed to Determine Whether the Discriminatory Actions and Omissions Resulted in the Condition of Segregation at Any Elementary School in Lansing School District at the Time of Trial.

This Court held in *Keyes, et al. v. School District No. 1, Denver, Colorado, et al.*, 413 US 189 at 202, 37 L Ed 2d 548, at 561-562 (1972), that

> "The essential elements of *de jure* segregation . . . stated simply . . . a current condition of segregation resulting from intentional state action. . . ."

This Court reaffirmed this holding in *Washington, et al. v. Davis, et al.*, 426 US 229 (1976). Neither the District Court nor the Court of Appeals found that the condition of segregation at any elementary school at the time of trial resulted from racially discriminatory acts or omissons of the defendant Board.

Lincoln was closed as an elementary school in 1965 and Kalamazoo Street was closed in 1970.

Verlinden Avenue School frequently referred to in the opinion of Judge Fox as "white Verlinden School" was integrated be-

fore 1967, and continues to be an integrated school. The ethnic count in September, 1975, showed Verlinden's student population was 60% white, 26% black and 12% Spanish surname. (366)

Main Street School was a segregated school in 1956, as the student population consisted of 62% Negroes. Although the creation of a zone in the Main Street attendance area in 1956 which permitted students residing there to attend either Lincoln or Kalamazoo School relieved overcrowding and reduced the percentage of black students to 55, blacks continued to move into the Main Street School service area and the proportion of black students increased accordingly. Main was 96% minority in 1964 when the total enrollment was 448 and there were 428 minority children enrolled. (383) In 1967, 312 children were enrolled at Main and 97% of these children were minority children.

In 1975 children residing in the Main Street School attendance zone totaled 255. Of these children, 201 were black, 51 were white and 3 were Spanish surname. The percentage of black elementary students residing in the Main Street attendance area in 1975 was 79%, the percentage of whites was 20% and the percentage of Spanish surname was 1%. The total number of children enrolled at Main did not change because of any act or omission on the part of the Board of Education, except that in 1964 some children were bused out of Main because of "parental pressure" to relieve overcrowding. The number of children at Main increased and decreased after 1965 not because of any act or omission on the part of the defendant Board. The decrease that took place resulted principally from industrial expansion and construction of a highway that passed through the Main Street attendance zone. Enrollment at Main Street increased because black people moved into the attendance zone of Main Street School and white people moved out. The number of white elementary

students residing in the Main Street attendance zone has risen from 7 in 1968 to 51 in 1975. The mobility of human beings accounts for the change in the student population at Main Street School and the Board of Education has not by any act or omission affected the mobility of people. The District Judge did not find that the condition of segregation that existed at Main Street School at the time of trial resulted from any intentional act on the part of the defendant Board.

Michigan Avenue School:

Michigan Avenue School was a segregated school at the time of trial. The degree of segregation was reduced because Michigan Avenue School was in the Cluster Plan. However, the District Judge did not make any finding that the segregative condition that existed at the time of trial resulted from "intentional state action."

In 1960 at least 59% of the student population at Michigan Avenue School was white. The greatest part of Michigan Avenue School service area is located in Census Tract 15 which was 59% white. (400-401) Smaller parts of Michigan Avenue School were located in Census Tracts 6 and 16, both of which were over 90% white in 1960. In 1964 the total student population at Michigan was 373 of which 280 students were minority. In 1964 the percentage of minority students was 75%. (383)

In 1975 the elementary students who resided in the Michigan Avenue attendance zone totaled 240. 186, or 78% of these students were black. 13 students, or 5%, were Spanish surname. 41 students, or 17%, were white. The defendant Board was not responsible for the decrease in total elementary student population in the Michigan attendance area from 373 in 1964 to 240 in 1975. Commercial and governmental expansion accounted for the decrease in total student population

at Michigan Avenue. No act or omission on the part of the Board accounted or resulted in the varying percentage of ethnic groups that made up the student population at Michigan Avenue. The District Judge did not find that the condition of segregation at Michigan Avenue resulted from any act or omission on the part of the defendant Board.

Vivian Riddle School:

If Vivian Riddle School were operated as a neighborhood school it would be a segregated school. However, the District Judge enjoined operation of Vivian Riddle School as a neighborhood school. If Vivian Riddle School were operated as a neighborhood school serving the attendance zones of Lincoln Street School, Kalamazoo Street School and Michigan Avenue School, there would be a total of 481 minority students and 45 white students in attendance. (370) [The total of 501 Black students shown on 371 is erroneous.] In 1961, there were 461 minority students at Kalamazoo Street School, 173 minority students at Lincoln School and 280 minority students enrolled at Michigan. The total of minority students enrolled at Lincoln, Kalamazoo and Michigan in 1964 was 914 students. The decrease of minority students in these three elementary school attendance zones is phenomenal and was completely ignored by the trial court and the Court of Appeals.

If Vivian Riddle School were operated as a neighborhood school it would end one-way busing for the students who reside in the Lincoln and Kalamazoo Street attendance zones and eliminate the complaint of Judge Fox and the Court of Appeals that the closing of Lincoln and Kalamazoo Street Schools denied the children in those attendance zones the right to attend a neighborhood school and more importantly would satisfy the desires of a majority of the people, black and white, whose children would be able to attend Vivian Riddle School if it were operated as a neighborhood school. (274) It should also be

noted that if the children residing in the Kalamazoo attendance zone had a school to attend in that zone, the percentage of minority children who attended that school would be greater than if these same children were permitted to attend Vivian Riddle School. If the children residing in the Kalamazoo Street attendance zone had a school in their zone to attend, the percentage of minority children would be 99%. At Vivian Riddle School the percentage of minority children who would be in attendance there would be 91%.

In view of the fact that busing of children out of their neighborhood schools was opposed by 41% of the affected black people in 1973 and 49% of the black people desired to have the new school that was to be constructed operated as a neighborhood school, it cannot be said that the defendant Board members who favor neighborhood schools are racially motivated.

IV

The Court of Appeals Erred in Affirming the Remedy Imposed on the Defendant Board Where the District Judge Had Not Made the Required Incremental Effects Test.

Petitioners appealed from the judgment entered by the District Judge on December 19, 1975. That judgment found liability against the petitioners but it also imposed a remedy. Subsequently the Court enlarged the remedy that was imposed on petitioners in the judgment of December 19, 1975. And petitioners appealed from the enlarged remedy. That appeal has not been resolved.

Petitioners may be premature in challenging the remedy portion of the judgment that was entered against them December 19, 1975, because of the subsequent enlargement of the remedy by the District Judge. On the other hand, petitioners do not

want to be faced with a claim that they failed to challenge the remedy imposed on them December 19, 1975, and, therefore, are bound by that remedy and the subsequent enlargement of that remedy by their failure to act at this time.

Petitioners have already discussed this subject matter to a certain degree hereinbefore when they pointed out that the District Judge had not made any determination that the current condition of segregation that existed at Michigan and Main Street Schools was the result of intentional state action.

The District Judge did not with regard to any segregative act charged by him against the defendant Board made a determination of the incremental effect of that act. And since the District Judge did not make any determination as to the incremental effect of any discriminatory act attributed to the Board of Education, he, of course, did not base the remedy that he imposed on such a determination.

The remedy that the District Judge provided was the reinstatement of the so-called Cluster Plan. The defendant Board rescinded the Cluster Plan on February 1, 1973. Judge Fox reinstated the Cluster Plan on August 10, 1973, and continued the Cluster Plan in operation under his judgment of December 19, 1975. The Cluster Plan was designed by the Superintendent and the administrative staff at Lansing School District to achieve at each of the 13 schools that were ultimately involved in the Cluster Plan a student population in which the minority children would be not less than 10% nor more than 45% of the students enrolled in each building involved in the Cluster Plan. (197) The Cluster Plan was designed to improve racial balance at the schools involved. It was not intended to remedy the racially discriminatory effects of the segregative acts attributed to the defendant Board. The percentage figures employed by the Superintendent and his administrative staff were based upon some HEW guidelines and

information that the Superintendent had gathered from other sources.

Under the decisions in *US v. Austin, Texas, School Agency* and *Dayton v. Mark Brinkman*, the District Court was in error. In view of the fact that the defendant Board has operated under a remedy imposed by the District Judge on August 10, 1973, at great expense and with the program having accomplished nothing academically or attitudinally, petitioners request that this Court consider the remedy issue that exists by virtue of the judgment that was entered December 19, 1975, and which has since been enlarged.

V

The Relationship Between the Segregative Acts Attributed to the Defendant Board by the Court of Appeals and Present Segregation Is "So Attentuated as to Be Incapable of Supporting a Finding of De Jure Segregation Warranting Judicial Intervention."

The evidence in this case did not justify ". . . a finding of *de jure* segregation warranting judicial intervention."

The District Judge determined that the movement of blacks into previously white neighborhoods changed the racial make-up of the elementary schools in the Lansing School District. (62) He also found that the defendant Board was not responsible for residential segregation. (79-80)

The District Judge found that:

> "Aside from the unequal conditions at Michigan Avenue School, the Lansing School District operated otherwise in a racially neutral manner with regard to facilities. Schools were (for the most part, but with important exceptions

discussed elsewhere in this opinion) attended by children who lived within the service area, and there is no evidence that school officials were responsible for racially imbalanced residential patterns. The same schools now used primarily by minority students were once used by Whites. It appears that the buildings have been adequately and equally maintained throughout the district. Equipment and teaching materials have been at least equal, and perhaps better than those available at other schools, due to the effective use of federal funds. These are a few White schools with small site sizes, and schools with larger sites are primarily in outlying areas annexed after 1950." (79-80)

The District Judge also found ". . . it appears that there is at present no discrimination in the hiring practices in the district." (86)

The District Judge noted that there was "considerable testimony indicating the competence of teachers in these minority schools." (87)

The District Judge stated that the old Board's ". . . decisions instituting one-way busing cannot be said to have been motivated by a pernicious or invidious intent." (119)

In view of the foregoing findings of the District Judge, it would appear that there was no basis for his finding that Lansing School District operated a dual elementary school system. These findings certainly preclude any determination "that the school authorities have carried out a systematic program of segregation affecting a substantial portion of the schools, teachers, and facilities within the school system . . ." *Keyes v. School District No. 1* at 201.

Most of the adverse findings made by the District Judge even if warranted related to matters that were of no consequence at the time of trial.

(A) The two 1957 boundary matters discussed by the District Judge did not in any way affect the racial make-up of the four schools and their service areas at the time of trial:

(1) Kalamazoo school was closed in 1970.

(2) Michigan Avenue School had been sold to the State of Michigan.

(3) Verlinden School became integrated before 1967.

(4) Main Street School's service area student population has dwindled from over 442 in 1963 to 244 in 1975.

(B) Vivian Riddle School was in process of construction and could serve the students living in the Michigan Avenue attendance area.

(C) Lincoln School was closed in 1965, and only 12 elementary students now reside in the attendance zone formerly served by Lincoln School. (370)

(D) The disproportionate assignment of minority teachers to minority schools was apparently of no consequence as the District Judge made no order requiring assignment of different numbers of minority teachers to the minority schools.

(E) Mobile units have not been used at Main Street School since 1965.

(F) There is no evidence that any transfer to Verlinden since 1970 was not valid, and white transfers since then have not exceeded four. As noted hereinbefore, Verlinden became an integrated school before 1967.

At the time of trial more black children lived in elementary school attendance zones outside the River Island Area than inside it. (369-371) A tremendous movement of black people has taken place in Lansing since 1957.

In view of the favorable findings and the fact that most of the adverse findings were at the time of trial of no consequence, there was no basis for the District Judge to find "the existence of a dual school system."

> "In *Swann*, we suggested that at some point in time the relationship between past segregative acts and present segregation may become so attenuated as to be incapable of supporting a finding of *de jure* segregation warranting judicial intervention." ***Keyes v. School District No. 1*** at 211.

The District Judge found that passage of defendant Board's resolution on February 1, 1973, rescinding the Cluster Plan resolution, was an intentional segregative act. He also found that the locating of Vivian Riddle School in a black area and the Board's desire to operate it as a neighborhood school was an intentional segregative act.

The defendant Board was restrained from carrying out its rescission resolution and was enjoined from operating Vivian Riddle School as a neighborhood school. Therefore, the defendant Board did not create a condition of segregation.

It is urged that this Court grant this petition so that the question as to whether there is a constitutional bar to rescission of an elementary school desegregation plan that is implemented before opponents of the desegregation plan can pursue their remedy judically or politically can be resolved. In this case, the majority of whites and 40% of the blacks were opposed to busing of their children from their neighborhood schools. Recall petitions were circulated and a suit was started in State court to enjoin the adoption of an elementary school desegregation plan that required busing of children from their neighborhood schools. The State court suit was removed to Federal court and Judge Fox dissolved the temporary restraining order that precluded the defendant Board from adopting an elementary school desegregation plan that required busing. Three days

later the defendant Board adopted the Cluster Plan resolution that provided an elementary school plan that required busing of children from their neighborhood school.

Prior to implementation of the Cluster Plan resolution, sufficient recall petitions were filed to require a recall election. However, a recall election could not be scheduled until November, 1972.

A fundamental question of equal protection of the laws arises: Should the legal and political rights of citizens in a free society be forever determined by the intervention of a Federal court whose order could not possibly be appealed in time to prevent action on a desegregation plan and the fortuitous event that a recall election could not be held until after the desegregation plan was implemented?

Surely in a free society citizens should be entitled to rescind a desegregation plan without regard to fortuitous events that prevented their precluding adoption and implementation of such a plan. If the desegregation plan were not constitutionally required, as the plan in this case was not, citizens should be able to rescind it without regard to when it was adopted. This is particularly true in this case where evaluation of academic results and attitudes show that the busing of chilldren has accomplished nothing. (379-381)

It is further urged that this Court grant this petition to resolve the question as to whether the desire to operate a neighborhood school system with the result that there would be racially identifiable schools in and of itself establishes racially motivated discriminatory purpose. There was no other basis for the District Judge to find that the desire of defendant Board members evidenced an intentional segregative purpose. Since the District Judge is of the opinion that a racially identifiable school is a segregated school without regard as to how it became

racially identifiable and further holds that education in a racially identifiable school plainly denies "equal educational opportunity," it would appear that his opinion as to the operation of a neighborhood school system that had racially identifiable schools might not rest on a sound legal foundation. (51; 123)

CONCLUSION

For the foregoing reasons, a Writ of Certiorari should issue to review the decision of the Sixth Circuit rendered herein on July 26, 1977.

Respectfully submitted,

NEWMAN & MACKAY

By FRED C. NEWMAN
Attorney for Lansing Board
of Education
510 Stoddard Building
Lansing, Michigan 48933